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NO. 85-5487

In The
# Supreme Court of the United States
October Term, 1985

MICHAEL MARNELL SMITH,
*Petitioner,*

*v.*

ALLYN R. SIELAFF, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
*Respondent*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Respondent

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ON WRIT OF CERTIORARI TO THE
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MOTION FOR LEAVE TO FILE
A BRIEF AS AMICUS CURIAE

The New Jersey Department of the Public Advocate[1] (Department) respectfully moves this Court for leave to file

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[1]The Department is specifically empowered to "represent the public interest in such administrative and court proceedings...as the Public Advocate

(continued on next page)

the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained; the attorney for the respondent has stated that he opposes the Department's request.

The Department is a cabinet level agency of New Jersey state government.

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[1](continued from previous page) deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27E-30.

Within the Department, the Division of Mental Health Advocacy (Division) was established to represent "indigent mental hospital admittees" in individual matters involving their admission to, retention in, or release from "mental hospitals," N.J.S.A. 52:27E-24, and to represent such persons in class actions on "an issue of general application to them," N.J.S.A. 52:27E-25.

The Office of the Public Defender (office) is administratively housed in the Department and provides criminal defense services to all indigent persons in the State charged with indictable offenses. See, N.J.S.A. 2A:158A-1 et seq.

N.J.S.A. 52:27E-2. It has litigated extensively in major areas affecting "the public interest" for over ten years.

The Department has participated before this Court both as counsel and as amicus curiae in a number of cases related to the issues before the Court here. See, e.g., Ake v. Oklahoma, 470 U.S.--, 105 S.Ct. 1007 (1985); Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043 (1983); Kremens v. Bartley, 431 U.S. 119 (1977); Strickland v. Washington, --U.S.--, 104 S.Ct. 2052 reh. den. 104 S.Ct. 3562 (1984).

The interest of the Department in this case arises from its long-term representation of persons charged with crime whose mental state is at issue,[2] of persons charged with

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[2] See, e.g., State v. Fields, 77 N.J. 282, 390 A. 2d 574 (1978) (right of insanity acquittees to periodic review of commitments); State v. Kahn, 175 N.J. Super. 72, 417 A. 2d 585 (App. Div. 1980) (right to contemporaneous competency

(continued on next page)

crime facing the death penalty,[3] of institutionalized persons who wish to seek or refuse various forms of psychiatric treatment and of persons facing involuntary civil commitment.[4] Often, protection of the rights of these clients involves use of psychiatric experts, both to evaluate possible claims and defenses and to assist

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[2](continued from previous page) determination prior to imposition of insanity defense over defendant's objections); In re A.L.U., 192 N.J. Super. 480, 471 A. 2d 63 (App. Div. 1984) (further articulation of periodic review rights of insanity acquittees).

[3]N.J.S.A. 2C:11-3.

[4]See, e.g., In re Geraghty, 68 N.J. 209, 343 A. 2d 737 (1975) (promulgation of court rule mandating appointment of counsel at commitment hearings; In re S.L., 94 N.J. 128 (1983) (establishing the rights of persons no longer dangerous to themselves or others).

counsel in trial preparation. Because an accurate assessment in these areas demands frank and candid discussions between the psychiatrist and the defendant, the full and effective assistance of counsel would be hindered if the candid discussion effectively waived his Fifth Amendment rights, or if counsel's ability to explore all possible defenses is chilled by the possibility of having to turn an adverse report over to the prosecution. The Fifth Amendment, the Sixth Amendment, the attorney-client privilege, and the work-product doctrine are all elicited by the communications among defense psychiatrist, defense attorney, and their client. Amicus will argue that New Jersey has for nearly thirty years barred the State from calling as a witness a defense-retained expert whom the defense will not call to testify, with no adverse effect. Amicus will further argue that in the

opinion of the State's highest court, such a rule actually promotes the administration of justice.

To the best of our knowledge, no other amicus or party in this case will deal with these matters from the same perspective as this Department has.

For the above reasons, the Department respectfully requests leave to file the attached brief amicus curiae in this case.

Respectfully submitted,

ALFRED A. SLOCUM
ACTING PUBLIC ADVOCATE

By _____
Linda G. Rosenzweig
Director
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Advocacy

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## INTEREST OF AMICUS CURIAE

The New Jersey Department of the Public Advocate, and two of its component parts, the Division of Mental Health Advocacy [hereinafter the Division] and the Office of the Public Defender, submit this brief in support of Michael Marnell Smith, and urge this Court to reverse the judgment of the Fourth Circuit and set aside the sentence of death. The

Division, a statutory portion of the cabinet level Department[1] is mandated to provide representation to "indigent mental hospital admittees"[2] in matters pertaining to their "admission to, retention in, or discharge from" mental hospitals in the State. N.J.S.A. 52:27E-24. In fulfillment of this obligation, the Division provides legal representation to residents of nine of New Jersey's counties on 7,700 matters per year.[3] As such, the Division has a substantial interest in this Court's consideration of any matter in which a civilly-committed patient, or a mentally

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[1] N.J.S.A. 52:27E-2.

[2] N.J.S.A. 52:27E-23.

[3] This figure includes not only initial commitment hearings, but also periodic reviews of civil commitments, commitments of persons found not guilty by reason of insanity or incompetent to stand trial and other issues affecting persons with involvement in the mental health system.

ill defendant, would be deterred from seeking the assistance of an expert psychiatric witness for use at trial because he knows that an unfavorable report would be available to the State.

The Office of the Public Defender, established in 1967, represents all indigents charged with indictable offenses in New Jersey. In 1984, the Public Defender represented indigents in 45,131 indictable cases. Of those, forty-four were new capital punishment cases. Since the restoration of the death penalty in New Jersey, the Public Defender has represented a total of eighty-nine defendants in capital cases. The Public Defender plainly has an interest in any matter pending before this Court which would infringe upon the latitude presently afforded defense counsel in New Jersey to explore defenses such as the insanity defense without fear of the State's discovery or use of any unfavorable reports. The Public

Defender therefore is vitally interested in any decision which would interfere with the right of a criminal defendant to effective assistance of counsel.

## SUMMARY OF ARGUMENT

In criminal trials at which the question of defendant's mental capacity at the time of commission of the alleged offense is raised in defense, the assistance of a psychiatric expert is essential to evaluate the viability of the insanity defense, to testify at trial if the defense is found to be viable, to assist counsel in preparing for cross-examination of the State's experts and to evaluate possible mitigating factors in the sentencing phase.

Since psychiatry is not an exact science, and many subjective elements enter into the final conclusions of a psychiatric expert, it is virtually impossible for defense counsel to predict with any certainty whether or not the report will be favorable to his client.

In order to provide effective representation, an attorney must be afforded the latitude and the freedom to fully explore and develop a meritorious defense on his

client's behalf without risking a crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial. In New Jersey, the Supreme Court has ruled that such protection is guaranteed by the Sixth Amendment right of the accused to effective assistance of counsel. In New Jersey, the Supreme Court decision -- protecting from discovery by the State reports which the defense does not intend to use at trial -- has existed without modification since 1957. The Court has on two occasions since that time affirmed and reiterated that constitutional protection. Indeed, the New Jersey Supreme Court has indicated that such a procedure considerably advances the interests of justice and in no way hampers the State's ability to prosecute.

In the within brief, this Court is urged, on Sixth Amendment right to counsel grounds, to reverse the judgment of the Fourth Circuit and set aside the sentence of death.

## ARGUMENT

### I. SINCE EXPERT PSYCHIATRIC ASSISTANCE PLAYS A PIVOTAL ROLE IN CRIMINAL PROCEEDINGS, THE MAXIMUM OPPORTUNITY FOR CONSULTATION AND INTERACTION WITH THE EXPERT MUST BE AFFORDED COUNSEL AS PART OF THE INTERNAL STRATEGIC PROCESS OF THE DEFENSE

This Court has unequivocally recognized that psychiatric experts play a "pivotal role" in criminal proceedings, in marshalling an effective defense to the charges, in assisting counsel to rebut the State's evidence in the sentencing phase and assisting the defense to obtain a fair trial. In Ake v. Oklahoma, 470 U.S. -- , 105 S.Ct. 1087 (1985), the majority clearly determined that "a defense may be devastated by the absence of a psychiatric examination and testimony." 470 U.S. at -- , 105 S.Ct. at 1097.

Plainly, a psychiatric expert makes a profoundly significant contribution to the internal strategic processes of the defense. Besides the interview of the defendant, the interaction between such an expert and defense counsel may involve the professional

evaluation of complex and highly sensitive material. The defense attorney often must reveal critical defense strategies to his evaluating psychiatrist to assist the psychiatrist in preparing his evaluation, as well as including the defense psychiatrist in trial preparations and formation of new strategies based on the evaluation.

Like Ake, Michael Marnell Smith is faced with the death penalty. For both, future dangerousness was a significant issue to be resolved in the capital sentencing phase. Plainly, the essential functions of a psychiatric expert delineated in Ake apply with equal force in the case at bar.

The first function of a psychiatric expert, noted in Ake, is to "help determine if the insanity defense is viable." Ake v. Oklahoma, 470 U.S., supra, at -- , 105 S.Ct., supra, at 1096. Indeed it was for that very reason that Smith's counsel moved the trial court to have expert

assistance provided. The Ake majority described this vital function:

> In this role, psychiatrists gather facts, both through professional examination, interviews and elsewhere;...they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition and about the effects of any disorder or behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. 470 U.S. at -- , 105 S.Ct. at 1095.

It is at this juncture that confidentiality of the psychiatrist's conclusions is urgently needed, for counsel's ability to test the viability of such a defense will be markedly impaired if the outcome of an unfavorable report will be available to the State.

Further, psychiatry is not an exact science:

> The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis,

> in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Addington v. Texas, 441 U.S. 418, 430 (1979).

It is virtually impossible for the attorney to predict with any certainty whether the expert's report would be favorable or not. If counsel is forced to predict that outcome at the earliest stages of a case -- and if he knows that an unfavorable report would be usable by the State -- an attorney is put to an unconscionable choice: he must either forego what might be an exculpatory report, or risk incriminating his client.

If counsel, in consultation with the psychiatric expert does determine that the insanity defense is viable, the psychiatrist assumes a second and "crucial" function, 470 U.S. at -- , 105 S.Ct. at 1096, of "presenting testimony"

to the jury and "assisting in preparing the cross-examination of the State's psychiatric witnesses." 470 U.S. at -- , 105 S.Ct. at 1096:

> They know the probative questions to ask of the opposing party's psychiatrist and how to interpret their answers. Unlike lay witnesses who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the elusive and often deceptive symptoms of insanity, Solesbee v. Balkcom, 339 U.S. 9, 12 (1950) and...assist lay jurors...to make a sensible and educated determination about the mental condition of the defendant at the time of the offense. 470 U.S. at , 105 S.Ct. at 1095-1096.

When legal insanity is likely "to be a significant factor in defense, the need for a psychiatrist is readily apparent." It is in such a case that "a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success." 470 U.S. at -- , 105 S.Ct. at 1097. The questions

asked by defense counsel of Dr. Pile and Dr. Dimitris at the sentencing hearing demonstrate this "devastating effect" foreseen by this court when psychiatric assistance in preparing psychiatric cross-examination is not available. Without psychiatric assistance, defense counsel inadvertently produced unrefuted testimony detrimental to Smith.

The third and final function of a psychiatrist identified by this Court in Ake is marshalling and establishing the relevant evidence during the sentencing phase:

> We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case.[4]

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[4]The Court's holding in Ake that a defendant is entitled to the assistance of a psychiatric expert where sanity is a significant factor at trial is not limited to capital cases and applies whenever the defendant's life or liberty is at risk. See concurring opinion of Chief Justice Burger, stating that such protections should only be available in capital cases, and disagreeing

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> The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed.... Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the juror's minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires...assistance in preparation at the sentencing phase. 470 U.S. at , 105 S.Ct. at 1097.

In fact, the widespread reliance on psychiatrists discussed by this Court in Ake leads to the inescapable conclusion that in cases where mental illness is a significant factor at trial, a defendant runs an unacceptably high risk of an inaccurate resolution of the issues if he is forced

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[4](continued from previous page) with the majority opinion insofar as it afforded such a right in non-capital cases as well. 470 U.S. at -- , 105 S.Ct. at 1099.

to forego the use of a psychiatrist. 470 U.S. at -- , 105 S.Ct. at 1096. In finding that the denial of expert psychiatric assistance to Ake, because of his indigency, had deprived him of due process of law, this Court gave explicit recognition to these three essential functions of a psychiatric expert. As the discussion in Point III, infra, makes plain, the decision of this Court in the case at bar will determine whether a defendant's access to a psychiatrist in his defense will be illusory or real. If defense counsel is to have the capacity to test the viability of an insanity defense, or explore the existence of mental illness in states where it is a mitigating factor in sentencing, or attempt to rebut "dangerousness" as an aggravating factor, he must be free to conduct such a wide-ranging psychiatric evaluation without fear that the outcome will be adverse, and the results available to the State. As this Court

observed in Estelle v. Smith, 451 U.S. 454, 471 (1981), the "decision to be made regarding the proposed psychiatric evaluation...is difficult even for an attorney because it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing." Weighed against the massive adverse effect of denial of psychiatric assistance in criminal procedures, the government interest is minimal.[5] In light of the essential nature of psychiatric assistance in an adversarial system, especially in capital

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[5]It is important to remember that the prosecution can obtain its own psychiatric expert. Even if it chooses not to do so, the State has the right to use hypothetical questions presented to psychiatrists, who have not evaluated the defendant, to demonstrate dangerousness in the penalty phase. Barefoot v. Estelle, 463 U.S. 880, 903 (1983).

cases, maximum latitude must be afforded the defense to develop evidence and present defenses.

## II. ACCURATE PSYCHIATRIC EXPERT OPINION CANNOT BE PROVIDED UNLESS THE DEFENDANT IS FREE TO FULLY AND OPENLY DISCLOSE HIS HISTORY AND HIS THOUGHTS

The main hallmark of a reliable, accurate and trustworthy expert psychiatric opinion is its foundation in an open and honest exchange with the defendant. If the defendant is reluctant to divulge the details of past mental illness and psychiatric treatment, and present fears, hallucinations and paranoia, it is abundantly clear that a complete history and an accurate diagnosis will be impossible. With an incomplete history or a diagnosis that is missing key indicators of major mental illness, evidence which might have established a viable insanity defense is irretrievably lost. When that occurs, the risk of an erroneous determination of guilt rises markedly.

It is undisputed that psychiatrists rely on full and open disclosure in order to

provide reliable expert opinion.[6] Commenting on the need for a detailed history, which includes past episodes of violence, Leigh Roberts, M.D., stresses the need for a probing examination. It is beyond dispute that incriminating material is often elicited:

> The evaluation in most cases should include a complete psychiatric

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[6] See Brief for American Psychiatric Association as amicus curiae, Estelle v. Smith , 451 U.S. 454 (1981). See also Group for the Advancement of Psychiatry, Rep. No. 45, at 92 (1960):

> The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. (Emphasis added).

> evaluation with a full past and present history of the client. It should also include a mental status examination. This includes assessment of intelligence, competence of organic brain functioning, symptoms of mental disorder, patterns of coping with stressful situations, and levels of anxiety and depression.... With alleged sex offenders, the detailed history, relationship of sexual problems to the alleged offense, and assessment of danger to past victims are all important....[7]

Roberts asserts that a complete examination may require several days or even weeks in highly complex cases if adequate data is to be elicited.[8] More recent commentators have echoed and reinforced Roberts' emphasis on the need for a comprehensive, probing examination accompanied by

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[7] Roberts, "Some Observations on the Problems of the Forensic Psychiatrist," in Allen, Ferster and Rubin (eds.), Readings in Law and Psychiatry 136, 140 (1968).

[8] Ibid.

a thorough history.[9]

Nonetheless, psychiatrists recognize that most defendants are extremely reluctant to divulge confidential material,[10]

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[9]Harold I. Kaplan, M.D., Benjamin J. Sadock, M.D., eds., Comprehensive Textbook of Psychiatry, Fourth edition, Vol. 2 (Baltimore: Williams and Wilkins, 1985).

[10]The disinclination of most people to reveal intimate and troublesome details of their lives to psychiatrists and psychotherapists has been widely commented on:

> Even those who are well-informed on other matters consider a person's treatment by a psychiatrist as evidence of his 'queerness' or even insanity.... A person may hesitate to visit a psychiatrist out of fear that he will be set apart from his fellow men. Slovenko, "Psychiatry and a Second Look at the Medical Privilege," 6 Wayne L. Rev. 175, 188 (1960).

See also, Bernstein, "Psychotherapist-Patient Privilege under Federal Rule of Evidence 501," 75 Journal of Criminal Law and Criminology 388, 398 (1984); Messersmith, "Evidence: The Psychotherapist-Patient Privilege under Federal Rule of Evidence 501," 23 Washburn Law Journal 706, 711 (1984). This reticence, combined with the unmistakable individual and societal benefit to be gained from open disclosure, have led to the recognition of the need for a physician-patient privilege. Although

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and further recognize that a great deal of information about the alleged offense may be contained in the expert psychiatric report:

> It is common in psychiatric evaluation that a great deal of private and highly personalized material is revealed.... In a criminal proceeding, for example, further revelation regarding the alleged offense may be forthcoming in the context of the psychiatric evaluation.[11]

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[10](continued from previous page) the privilege did not exist at common law, see 8 J. Wigmore, Evidence in Trials at Common Law §2380, at 819-820 (J. McNaughton rev. ed. 1961), forty states and the District of Columbia have since 1828 enacted statutes preventing a physician from testifying about information relevant to the patient's treatment that was divulged to the physician in his professional capacity. Only Alabama, Connecticut, Florida, Kentucky, Maryland, Massachusetts, New Mexico, South Carolina, Tennessee and West Virginia do not have a statutory physician-patient privilege. The statutes enacted in the 40 other states vary widely in their formulation of the privilege. See "Developments in the Law: Privileged Communications," 98 Harv. Law Review 1450, 1532 (1985). Nonetheless, they collectively demonstrate the legislative recognition of the need for open disclosure, and the degree to which that openness is not always forthcoming.

[11]Leigh M. Roberts, M.D., p. 141, op. cit., fn. 4 , supra.

Significantly, however, most forensic psychiatrists, in conducting a psychiatric examination for the defense, presume that the contents of their report will not be turned over to the prosecution if they are not called as a witness by the defense:

> In the case when a psychiatrist performs an evaluation initiated by the defendant for purposes of providing the defense attorney with assistance in preparing for and conducting the trial, then communications between the evaluator and the defendant are privileged under the attorney-client privilege. The defendant does not waive the attorney-client privilege with regard to those psychiatric consultations that the defendant does not intend to use at trial.[12]

Slovenko explains the reason why the contents of such a report are privileged:

> Under the adversary system, each side is expected to put its best

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[12] Slovenko, "Forensic Psychiatry," in Kaplan and Sadock (eds.), 2 Comprehensive Textbook of Psychiatry, p.1960, 1965 (1985) (hereinafter Comprehensive Textbook of Psychiatry).

foot forward, with the judge and jury deciding between them on the basis of the evidence offered. The issues are polarized. Thus, when prosecutors decide to undertake a prosecution, they must prosecute to the best of their ability. They do not ask the jury to return a verdict of not guilty. Neither would the defense counsels argue that their clients are guilty of the crimes charged.... Attorneys put experts or other witnesses on the stand only if they will advance the interests of their clients. Under the work-product rule, the attorneys have a right not to divulge experts whom they have cnsulted but have decided not to use because of their unfavorable reports.[13] (emphasis added)

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[13] Comprehensive Textbook of Psychiatry, supra, at 1961. See also Kern, "Criminal Responsibility and the Psychiatrist," in N.J. Psychiatric Association (ed.), Medico-Legal Digest for New Jersey Psychiatrists, p. 14-1 (1982):

> If the psychiatrist is hired by the prosecution, the prisoner should be warned that he is free to refuse to answer any questions.
>
> The relationship of a prosecutor's examiner to the examinee is not a therapeutic relationship and it is not unethical to reveal private details of the examination. In this situation, the physician is an agent of the prosecution and is not the defendant's therapist.
>
> A psychiatrist hired by the defense is in a different position. The

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When a psychiatrist operates on the assumption that an adverse report will not be provided to the State, he is free to conduct the type of wide-ranging inquiry and investigation necessary to evaluate whether an insanity defense is viable. Candor and openness from the defendant are certainly more likely if the defendant is assured that the internal strategic processes of the defense are intact. The psychiatrist is then free to ask the defendant questions concerning his appreciation of the nature and quality of the act in question, his understanding of whether it was right or wrong and he is free to probe whether at the time of the alleged offense the defendant

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[13](continued from previous page) defendant has been advised to tell everything to the doctor and if the doctor testifies, he swears to tell the whole truth. Therefore, if the doctor's testimony would damage the defense case, he should so advise the attorney who may choose another physician to examine his client. (emphasis added)

was, or was not, suffering from a mental disease or defect. If a psychiatrist knows from the outset that the report need not be given to the State if he concludes that the defendant was not insane at the time of the offense, then he operates from the perspective of maximum professional candor. Without confidentiality and without a shield against compelled disclosure to the State, no defendant will have the confidence in the psychiatrist which will enable the psychiatric professional to do that which his experience and training qualify him to do -- render an expert opinion. Unless the confidence is inviolate, there will of necessity be restraints upon communication between the defendant and his potential expert witness.

## III. AS AN EXPRESSION OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, NEW JERSEY HAS FOR NEARLY THREE DECADES, GRANTED THE DEFENSE THE LATITUDE TO FULLY EXPLORE AND DEVELOP PSYCHIATRIC DEFENSES WITHOUT THE FEAR THAT UNFAVORABLE MATERIAL SO OBTAINED CAN BE USED AGAINST THE DEFENDANT

For nearly three decades, criminal defendants in the State of New Jersey have enjoyed the maximum freedom to explore the soundness and advisability of offering a particular defense without the fear that any unfavorable material so obtained can be used against them. The rule safeguarding the internal strategic processes of the defense has existed in New Jersey since 1957 as an expression of the Sixth Amendment right under the United States Constitution to effective assistance of counsel and of the analogous, and identical, provision of the New Jersey Constitution. Although the New Jersey Supreme Court has been presented with numerous opportunities to relax, weaken or

modify the protection it established in 1957, it has declined to do so. Instead, the state's highest tribunal has continually explicitly reaffirmed the constitutional protection previously articulated. Plainly, the constitutional guarantee articulated in New Jersey is an essential ingredient of its criminal justice system, and is not viewed by the Court as working an unjust result on the effort of the State to prosecute allegedly criminal behavior.[14] In fact, in the course of its decision affirming the 1957 State v. Kociolek precedent, the Supreme Court firmly announced in State v. Mingo, 77 N.J. 576, 392 A. 2d 590 (1978) its belief that such a rule "will not in any way hamper the State's ability to effectively prosecute its case."[15]

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[14]New Jersey is among ten states in which a judicial decision holds that defense-requested mental evaluations are protected by the attorney-client privilege. See Appendix C, Opening Brief of Petitioner Smith, filed December 5, 1985.

[15]State v. Mingo, 77 N.J. 576, 587, 392 A. 2d 590, 595 (1978).

> In the vast majority of cases, the State will be able to obtain its own expert on any matter as to which it considers expert testimony potentially necessary. The interests of justice are considerably advanced when a defendant receives the most effective assistance of counsel possible. Since the State's primary interest is not to convict but to see that justice is done, it, as well as defense attorneys, should welcome the positive effect our decision will have on the administration of criminal justice in New Jersey. State v. Mingo, 77 N.J. 576, 587-588, 392 A. 2d 590, 595 (1978).

If any doubt existed that the Kociolek rule enhanced the administration of justice in New Jersey, such doubt was laid to rest after Mingo.

In State v. Kociolek, 23 N.J. 400 (1957), 129 A. 2d 417, the New Jersey Supreme Court first established the constitutional foundations of the rule that a defense-retained psychiatric expert may not be called as a witness by the State if the defense does not intend to rely on his testimony. In Kociolek, the cost of the psychiatric examination was borne by the County due to the defendant's indigence as

Smith's exam was paid for by the Commonwealth herein. In Kociolek, the State obtained a copy of the report directly from the physician. 23 N.J. at 411-412, 129 A. 2d at 423 . The Court found that the State's calling the defense psychiatrist as a rebuttal witness in the guilt phase violated the attorney-client privilege, a necessary basis of both the constitutional right against self-incrimination and the right of a criminal defendant to effective assistance of counsel in his defense:

> The psychiatrist was retained to... impart to [the accused's] attorneys the benefit of his expert judgment and experience for their use in the preparation and presentation of the defense; and the communications made by the accused to the psychiatrist in response to his interrogation... are privileged, just as much so as if the revelations had been made by the accused directly to his attorneys. The privilege extends to the necessary intermediaries and agents through whom the communications are made. And it includes communications between the attorney and a scientific expert retained to aid in the presentation of the defense, a confidential employment. The principle is of the essence of the ancient common-law attorney-

> client privilege, in this country and in England and the continental countries deemed a basic civil right, indispensable to the fulfillment of the constitutional security against self-incrimination and the right to make defense with the aid of counsel skilled in the law.
>
> * * *
>
> The privilege is an accommodation of competing interests, the ascendency for compelling policy reasons of the protection from unauthorized disclosure of communications between attorney and client over general testimonial duty and compulsion in the interest of truth and justice. The attorney-client privilege is basic to a relation of trust and confidence that, though not given express constitutional security is yet essentially interrelated with the specific constitutional guaranties of the individual's right to counsel and immunity from self-incrimination, the oldest of the privileges for confidential communications. 23 N.J. at 413-414, 414-415; 129 A. 2d at 424, 425.

In Kociolek, the New Jersey Supreme Court determined, and properly so, that the attorney-client privilege is of historical origin in the representation of the accused.

23 N.J. at 414-416, 129 A. 2d at 425 .[16]

In ruling in Kociolek that the "privilege

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[16] The original rule barring attorneys from revealing client confidences was based upon consideration for the oath and honor of the attorney rather than for the apprehensions of the client, and upon the belief that gentlemen do not reveal secrets entrusted to them. 8 Wigmore, Evidence §2290, at 543 (McNaughton rev. ed. 1961) (hereinafter Wigmore).

However, with the shift in the factual orientation of trials, a new need for the privilege emerged. Up until 1450 in England, jurors did not hear evidence so much as they reached conclusions based on their prior knowledge of the case as members of the community. Wigmore, supra, §2190, at 62. See also J. Thayer, A Preliminary Treatise on Evidence at the Common Law, at 47-48, 90-93 (1898) (hereinafter, Thayer). Indeed, procedures for compelling testimony did not generally exist. A witness who volunteered testimony was viewed as an unwanted intermeddler and subjected to suit for maintenance, a common law tort for stirring up litigation. Wigmore, supra, §2190, at 63-64. Gradually, the common law trial process changed. During the period 1450-1460 equity courts recognized a subpoena that the Chancellor might issue on behalf of the plaintiff to a non-party witness. Thayer, supra, at 129. A similar change in the law courts did not occur until the sixteenth century, when in 1562-1563, the Statute of Elizabeth abolished the tort of maintenance (stirring up litigation) and authorized penalties for a witness' refusal to testify after service of process and tender of expenses. Wigmore, supra, §2190, at 65. With the risk

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is in vain if it does not secure freedom of professional consultation," 23 N.J. at 415 , 129 A. 2d at 425, the Court laid the

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[16] (continued from previous page) of compelled testimony came the need to examine the concept of privilege.

The first privilege to spring forth following the risk of testimonial compulsion was the attorney-client privilege. Wigmore, supra, §2290, at 542-543. The attorney-client privilege was recognized in the reign of Elizabeth I in numerous cases that followed closely on the heels of the Statute of Elizabeth. Wigmore cited and analyzed numerous cases which held that an attorney could not be compelled to disclose the confidences of his client:

> Berd v. Lovelace, Cary 88, 21 Eng. Rep. 33 (Ch. 1577) (solicitor exempted from examination touching the cause); Dennis v. Codrington, Cary 143, 21 Eng. Rep. 53 (Ch. 1580) (on a motion to examine one Oldsworth, "touching a matter in variance, wherein he hath been of Counsel, it is ordered he shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel, either by the indifferent choice of both parties or with either of them by reason of any annunity or fee"); Kelway v. Kelway, Cary 127, 21 Eng. Rep. 47 (Ch. 1580) (solicitor of plaintiff to be examined for defendant, "upon any interrogatory which shall not be touching the secrecy of the title or of

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groundwork for its later decisions in State v. Mingo, 77 N.J. 577, 392 A. 2d 590 (1977) and State v. Williams, 80 N.J. 472, 404 A. 2d 34 (1978).

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[16] (continued from previous page) any other matter which he knoweth as solicitor only"); Roll, C.J., in Waldron v. Ward, Sty. 449, 82 Eng. Rep. 853 (K.B. 1654) ("He is not bound to make answer for things which may disclose the secrets of his clyent's cause"); Sparke v. Middleton, 1 Kebl. 505, 83 Eng. Rep. 1079 (K.B. 1664) (counsel required in testifying to tell only "such things as he either knew before he was of counsel or that came to his knowledge since by other persons"); Legard v. Foot, Rep. t. Finch 82, 23 Eng. Rep. 44 (Ch. 1673) (attorney privileged); Anonymous, Skin. 404, 90 Eng. Rep. 179 (K.B. 1693) (counsel privileged). Wigmore, supra, §2290, at 542.

Later English cases made it plain that the foundation of the rule is "out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings." Greenough v. Gaskill, 1 Myl. E.K. 98, 103 (1833). Without secrecy of communication, there cannot be the "unrestricted and

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In State v. Mingo, supra, decided twenty-one years after Kociolek, a unanimous New Jersey Supreme Court ruled that permitting prosecutorial discovery of a report of a handwriting expert retained by the defense, and the use of that expert as a witness by the State, violated the defendant's Sixth Amendment right to counsel. The decision in Mingo was based on the recognition that in order to provide effective representation an attorney must be afforded the latitude and the freedom to fully explore and develop a meritorious defense on his client's behalf without risking a "crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial." State v. Mingo, 77 N.J., supra, at 582, 392 A. 2d, supra, at 592

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16 (continued from previous page) unbounded confidence in the professional agent" which is essential to the administration of justice." Anderson v. Bank, L.R. 2 Ch. D. 644, 649 (Jessel, M.R. 1876).

In Mingo, the Court affirmed a crucial element of its Kociolek holding, i.e. that any scientific expert retained by the defense -- whether it is a psychiatrist, pathologist, handwriting expert, or ballistics expert -- functions as the agent of the attorney and that therefore any communication by the defendant to him is the legal and functional equivalent of a communication by the defendant to the attorney himself. 77 N.J., supra, at 583, 392 A. 2d, supra, at 593 . See also 8 Wigmore, Evidence §2301 (McNaughton rev. 1961) and cases collected and cited therein.

The Court then reiterated the Kociolek rule that defendant's attorney must have full investigative latitude in developing a meritorious defense, and that the State had no justification for calling the defendant's expert as its witness. The Sixth Amendment foundation of such a rule was reaffirmed:

> [T]he State had no justification for calling defendant's handwriting

> expert as its witness. If it considered the identity of the disputed note's author to be a critical part of its case, the State was fully capable of retaining its own expert....
>
> The right to counsel afforded criminal defendants by the Sixth Amendment of the United States Constitution and by Art. I, par. 10 of the New Jersey Constitution comprehends the right to the effective assistance of counsel. To safeguard the defense attorney's ability to provide the effective assistance guaranteed by these constitutional provisions, it is essential that he be permitted full investigative latitude in developing a meritorious defense on his client's behalf. This latitude will be circumscribed if defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial. State v. Mingo, 77 N.J., supra, at 581-582, 392 A. 2d, supra, at 592.

The Court's opinion went beyond establishing a bare-bones rule. Instead, Justice Pashman's opinion articulated detailed procedures which govern the discovery process for expert opinion in criminal cases:

> a. The ruling is limited to reports of opinions of expert

witnesses, and has no bearing upon the discovery or utilization at trial of information of any other nature assembled by the defense. 77 N.J. at 585, 392 A. 2d at 594 .

b. The defense must indicate that it has obtained a report it intends to use at trial if the State poses that question in discovery. Discovery of the report must then be granted to the State. 77 N.J. at 585-586, 392 A. 2d at 594.

c. Although the State may cross-examine the expert testifying for the defense, the defense does not waive its right to control the testimonial use of the expert -- he remains unavailable to the State as a witness. 77 N.J. at 586, 392 A. 2d at 595.

d. Should the defense elect not to present the expert as a witness after previously indicating to the contrary, the fact that his otherwise confidential reports have been disclosed to the prosecution does not entitle the State to call the expert as its expert over objection by the defense. 77 N.J. at 586, 392 A. 2d at 595.

e. Court orders can be entered to obviate any danger that the defense might deprive the State of expert assistance by "scooping up" all the experts in the rare case involving a subject as to which the number of qualified experts is few. 77 N.J. at 587, fn. 3, 392 A. 2d at 595.

The policy underlying the Mingo holding was declared by the Court -- the internal strategic processes of the defense must be safeguarded if effective assistance of counsel is to be guaranteed:

> This rule will safeguard the internal strategic processes of the defense...by affording (counsel) the maximum freedom to seek the guidance of expert advice in assessing the soundness and advisability of offering a particular defense without the fear that any unfavorable material so obtained can be used against his client...Reliance upon the confidentiality of an expert's advice itself is a crucial aspect of a defense attorney's ability to consult with and advise his client. If the confidentiality of that advice cannot be anticipated, the attorney might well forego seeking such assistance, to the consequent detriment of his client's cause. The protection from unwarranted disclosure we today mandate is an indispensable element of a criminal defendant's constitutional right to the effective assistance of counsel. 77 N.J. at 587, 392 A. 2d at 595.

One year later, the New Jersey Supreme Court broadened the Mingo holding. In State v. Williams, 80 N.J. 472, 404 A. 2d

34 (1979), the Court extended the Mingo/ Kociolek protection to bar discovery of statements of fact witnesses, prepared by the defense, which counsel does not intend to use at trial. 80 N.J., supra, at 480-481, 404 A. 2d, supra, at 38. In Williams, an Order had been entered requiring the defense to turn over to the State discovery of photographs shown to the victim by the defense in which she positively identified the defendant, along with a memorandum prepared of the session by defense counsel. In ruling that such a procedure "trespassed on defendant's right to effective assistance of counsel," 80 N.J. at 477, 404 A. 2d at 37, the Court reiterated the Mingo holding and its Sixth Amendment underpinnings:[17]

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[17] See also State v. Mingo, 77 N.J., supra, at 583-584, 392 A. 2d, supra, at 593, where the Court reinforced the constitutional assumptions that underlay its earlier decision in Kociolek:

> We also find our decision in Kociolek, 23 N.J. 400 (1957), although formulated in terms of the

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The investigative course selected by an attorney in order to prepare a proper defense for his client frequently entails a high order of discretion. This often calls for more than simple fact gathering.... Blanket discovery of the fruits of this kind of legal creativity and preparation may impact directly upon the freedom and initiative which a lawyer must have in order to fully represent his client. State v. Mingo, supra. Curtailment or inhibition of this attorney function by discovery, not otherwise justified to avoid trial surprise, would permit the State to undermine the effectiveness of an attorney in serving his client.

It is abhorrent to our concept of criminal justice to compel a defendant, under the guise of reciprocal discovery, to disclose to the State inculpatory evidence uncovered by defense counsel during his preparation for trial and then

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[17] (continued from previous page) attorney-client privilege, to be highly relevant as a matter of the defendant's right of effective representation by counsel.... The rationale of Kociolek is that the psychiatrist was the agent of the attorney and that therefore any communication by the defendant to the psychiatrist in the course of his examination was the equivalent of a communication by the defendant to the attorney himself.

> allow the State to use that evidence as part of its case in chief. That is exactly what happened in this case. State v. Williams, 80 N.J., supra, at 479, 409 A. 2d, supra, at 38 .

Thus, for over thirty years New Jersey courts have viligantly protected the Sixth Amendment right to a fair trial by shielding the internal strategic processes of the defense from discovery by the prosecution. In so doing, the Court has avoided "chilling" defense preparation and investigation,[18] and has implemented a rule which in the Court's opinion should have a "positive effect...on the administration of criminal justice in New Jersey." State v. Mingo, 77 N.J., supra, at 588, 392 A. 2d, supra, at 595. Amicus accordingly urges this Court

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[18] To hold otherwise would infringe on a defendant's constitutional right to the effective assistance of counsel because of the chilling effect it would have on defense investigation." State v. Williams, 80 N.J., supra, at 478, 404 A. 2d, supra, at 37 .

to consider the successful experience of the New Jersey courts, and the Sixth Amendment underpinnings thereof, as part of its deliberations in the case at bar. Although the arguments of petitioner Smith before this Court are couched principally in terms of the Fifth Amendment's right against self-incrimination, in at least one decision, this Court has considered attorney-client privilege arguments sua sponte when they had not been asserted by the defendant. In Fisher v. United States, 425 U.S. 391 (1976), defendant taxpayers sought to protect from Government discovery their accountants' reports which had been turned over to their counsel, and had relied on the Fifth Amendment:

> The taxpayers in these cases, however, have from the outset consistently urged that they should not be forced to expose otherwise protected documents to summons simply because they have sought legal advice and turned the papers over to their attorneys. The Government appears

> to agree unqualifiedly. The difficulty is that the taxpayers have erroneously[19] relied on the Fifth Amendment without urging the attorney-client privilege in so many words. They have nevertheless invoked the relevant body of law and policies that govern the attorney-client privilege. In this posture of the case, we feel obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment. Fisher v. United States, 425 U.S., supra, at 402.

The decision in United States v. Nobles, 422 U.S. 225 (1975) also reflects this Court's recognition that the attorney-client privilege is frequently intertwined with Fifth Amendment claims. Nobles presented for review the defense contention that its

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[19] Amicus does not in any way suggest that petitioner Smith's reliance on the Fifth Amendment herein was erroneous. Such reliance is amply supported by the law and facts involved in this case.

investigator's contemporaneous report of prosecution eyewitnesses' identifications of the defendant was not discoverable by the State. Although the Court was not persuaded that the Fifth Amendment prevented disclosure of the materials sought by the State,[20] it did however find that the attorney-client privilege applies to the preparation of defense investigative reports, and the privilege was held theoretically applicable to agents of the defense, persons who function in the same capacity as did Dr. Pile

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[20] In Nobles, the Fifth Amendment claim was rejected because it "does not extend to the testimony or statements of third parties called as witnesses at trial." 422 U.S. at 235 (emphasis added). It is plainly distinguishable from the case at bar, since unlike the defense investigator in Nobles, Dr. Pile was not called as a witness by the defense.

in the case at bar. Plainly, the privilege extends beyond the statements of the accused to his counsel and is broad enough to include the statements of experts and other witnesses:

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself. Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case. 422 U.S. at 238, 239 (emphasis added).

This Court also noted in Nobles the essential role that the work-product doctrine plays in the criminal justice system in

obtaining a fair trial for the accused:

> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital.[21] The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards

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[21] See Upjohn v. United States, 449 U.S. 383, 389 (1981):

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence §2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

See also, The Attorney-Client Privilege and the Work-Product Doctrine, American Bar Association 7 (1983).

> assure the thorough preparation and presentation of each side of the case. 422 U.S. at 238.[22]

As early as 1826, this Court recognized the essential function of the attorney-client privilege.[23]

Finally, in Estelle v. Smith, 451 U.S. 454, 469-471 (1981), this Court found a Sixth Amendment violation when the contents of a court-ordered psychiatric examination of the defendant's competency to stand trial were used by the State in the sentencing hearing. Although the facts in Estelle are different from those in the case at bar -- i.e. in Estelle the exam was court-ordered, not, as here, done at the request of the defense -- nonetheless, the underlying reasoning of Estelle is fully applicable to the case at bar, and supports reversal. In Estelle, this Court found that the

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[22] The Court, however, in Nobles found that the privilege had been waived. 422 U.S. at 239.

[23] See Chirac v. Reinicker, 24 U.S. 280, 294-295 (1826).

examination of the defendant by a psychiatrist was a "critical stage" in the proceedings against the defendant, within the contemplation of Powell v. Alabama, 287 U.S. 45, 57 (1932). That being so, the assistance of counsel was needed to evaluate the possible uses of the examination, and to weigh the comparative risks and benefits of such an examination before deciding whether to submit to the exam. Estelle v. Smith, 451 U.S., supra, at 471. In the case at bar, the same considerations apply. Petitioner Michael Marnell Smith is equally unable without counsel to evaluate the benefits and risks of a psychiatric examination, or, without legal counsel, to develop possible defenses.[24] The strategy decisions necessary

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[24] In Powell v. Alabama, 287 U.S., supra, at 69, the Court found that the accused has no ability to cope with the complexities of the law unassisted:

> Even the intelligent and educated layman has small and sometimes no

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for an effective defense are impossible without counsel. Thus, the same constitutional principles articulated in Estelle v. Smith, supra, compel the conclusion that in the case at bar the Sixth Amendment protects internal strategic decisions of the defense from being discovered or used by the prosecution.

Thus, the experience of the courts in New Jersey over nearly three decades establishes that the administration of

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[24] (continued from previous page) skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one.

justice is benefitted when counsel for the defendant has the latitude to explore all possible defenses without the chilling effect caused by the spectre of having to turn such a report over to the State. In New Jersey, such a result is grounded in the Sixth Amendment, and would protect reports such as Dr. Pile's from use by the State. The New Jersey experience, along with the prior decisions of this Court, make it plain that the Sixth Amendment forbids the abhorrent procedure utilized in this case.

## CONCLUSION

Based on the foregoing, amicus respectfully submits that this Court should reverse the judgment of the Fourth Circuit, set aside the sentence of death, and remand the matter for a new trial at which the Commonwealth of Virginia would be barred

from calling Dr. Pile as a witness or using any of the material contained in Dr. Pile's report.

Respectfully submitted,

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